IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 1ST JUNE 2007 / 11TH JYAISHTA 1929

CRL.A.No. 567 of 1999(C)

CC.529/1998 of JUDL.MAGISTRATE OF FIRST CLASS-I, ERNAKULAM

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APPELLANT: COMPLAINANT:

M/S.BHAVANI AUTO DISTRIBUTORS, GOPALAPRABHU ROAD, ERNAKULAM, COCHIN - REPRESENTED BY ITS PROPRIETOR, N.K.GUPTA.

BY ADV. SRI.V.SANTHARAM

RESPONDENTS:

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1. K.MURALEEDHARAN, PROPRIETOR, M/S.ERNAD AGENCIES, NEAR GUEST HOUSE STOP, KAVUNGAL, PERINTHALMANNA ROAD, MALAPPURAM.

2. STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI.KANNAPPU C.M. FOR R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. Thankappan, J.

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Crl. A. No. 567 of 1999

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Dated this the 1st day of June, 2007

JUDGMENT

Complainant in C.C.No.529/98 on the file of the Judicial Magistrate of the First Class-I, Ernakulam is the appellant. First respondent, accused in the complaint, was acquitted on the ground that no notice was served on the 1st respondent and the appellant could not prove that the 1st respondent have knowledge of the notice or he had refused to receive the same. The case of the appellant is that the 1st respondent purchased spare parts worth for Rs.23,989/- and issued Ext.P1 cheque for that amount and when it was presented for encashment, the same was dishonoured for insufficiency of funds in the account of the 1st respondent. On receipt of intimation of dishonor of the cheque, a lawyer's notice was caused to the 1st respondent demanding of the amount covered by the cheque. The said notice was returned to the appellant with the endorsement “not claimed”. Thereafter, the complaint was filed. To prove the case against the 1st respondent, the appellant himself was examined as PW1 and Exts.P1 to P6 were marked. After closing the evidence of the appellant, the 1st respondent was

questioned under section 313 Cr.P.C. He denied the allegation and stated that he was having no transaction with the appellant and Ext.P1 cheque was given as a security to Meenakshi Enterprises. After considering the entire evidence, the trial court acquitted the 1st respondent on the ground that the complaint was filed without giving a statutory notice to the 1st respondent as provided under proviso (b) to section 138 of the Negotiable Instruments Act, hereinafter referred to as "the Act".

2. The learned counsel for the appellant submits that the finding entered by the trial court with regard to the service of notice is perverse. The learned counsel further submits that the trial court ought to have found that the appellant had proved the issuance of notice and there was a deliberate evasion on the part of the 1st respondent in receiving the notice.

4. It is not disputed that the cheque was dishonoured for insufficiency of funds in the account of the 1st respondent. Ext.P3 memo shows that the cheque was returned to the appellant on 10-9-1996. Ext.P5 postal receipt shows that the appellant had sent demand notice to the 1st respondent on 19-9-1996. The notice was returned with the endorsement "not claimed'. When the 1st respondent was questioned under section 313 Cr.P.C., his case was that he had issued Ext.P1 cheque to Meenakshi

Enterprises as security. This was only bald defence as no attempt was made to prove his case. The trial court did not consider it as a ground for acquittal. However, the trial court after considering the facts and circumstances of the case found that the complaint was filed without giving a statutory notice to the 1st respondent as provided under section 138 of the Act and hence the complaint was not maintainable. To come to the above conclusion, the trial court had relied on two decisions of this Court reported in Sosamma V. Rajendran (1993(1) KLT 629) and Hameed Bafaky V. Moideen (1995 (2) KLT 619).

5. Question to be considered in this case is whether a notice returned with the endorsement "not claimed" or "unclaimed" can be considered as sufficient for the purpose of due compliance with section 138 of the Act?

Proviso (b) to section 138 of the Act reads as follows:-

> "the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid".

6. In Madhu V. Omega Pipes Ltd. (1994(1) KLT 441) His Lordship Justice K.T. Thomas, as he then was, interpreted the expression "giving a notice in writing" used in proviso (b) to section 138 of the Act and held that "**the realistic interpretation for the expression "giving notice" in the present context is that if the payee has despatched notice in the correct address of the drawer reasonably ahead of the expiry of thirteen days, it can be regarded that he make the demand by giving notice within the statutory period".** To come to this conclusion His Lordship relied on a decision of the Apex Court reported in Narasimhah V. Singri Gowda (AIR 1966 SC 330). In the above decision the Apex Court considered the provision and held as follows:-

> ""Giving" of anything as ordinarily understood in the English language is not complete unless it has reached the hands of the person to whom it has to be given. In the eye of law however "giving" is complete in many matters where it has been offered to a person but not accepted by him. Tendering of a notice is in law therefore giving of a notice even though the person to whom it is tendered refuses to accept it. We can find however no authority or principle for the proposition that as soon as the person with a legal duty to give the notice despatches the notice to the address of the person to whom it has to be given , the giving is complete."

Though the trial court had relied on the above decision, the principle adopted by the Apex Court was not correctly applied in the facts and

circumstances of the present case. In a decision reported in Rajneesh Aggarwal V. Amit J. Bhalla ((2001)1 SCC 631) the Apex Court considered the question of "issuing notice" and held that **"the object of issuing notice indicating the factum of dishonour of the cheque is to give an opportunity to the drawer to make the payment within 15 days, so that it will not be necessary for the payee to proceed against in any criminal action, even though the bank dishonoured the cheques".** This question was also considered by this Court in a decision reported in Joseph Jose V. Baby (2002(3)KLT SN 64) and this Court categorically held that "sending of notice in the correct address of the accused and return of the same with endorsement "unclaimed" are sufficient for the purpose of due compliance with section 138(b) of the N.I. Act" The burden of the appellant to prove that the notice was given to the 1st respondent was discharged, as it has come out in evidence that the postal authorities have given intimation of the notice to the 1st respondent to whom it has to be given. If so, it is the duty of the 1st respondent to show that the notice was not in the correct address or not served on him.

7. In the above circumstances, this Court has no hesitation to come to a conclusion that the trial court has committed an error in recording a

finding that the complaint was filed without giving a statutory notice to the 1st respondent as provided under proviso (b) to section 138 of the Act. Hence, the impugned judgment is set aside and the matter is remanded to the trial court for fresh consideration. Both the appellant and the 1st respondent shall be given an opportunity to adduce additional evidence, if any, to substantiate their case. As the matter is of the year 1996, it shall be disposed of as early as possible, at any rate within three months from the date of appearance of the parties.

The parties shall appear before the court below on 21-7-2007

K. Thankappan,
Judge.

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K. Thankappan,J.

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Crl.A.567 of 1999

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Judgment
1-6-2007